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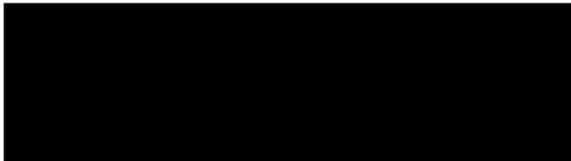
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: **SEP 02 2010**

IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction business. It seeks to employ the beneficiary permanently in the United States as a construction laborer. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date of the visa petition onwards. Therefore, the director denied the petition.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 23, 2008 denial, at issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on the ETA Form 9089 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on August 24, 2007. The proffered wage as stated on the ETA Form 9089 is \$10.45 per hour (\$21,736 per year). The ETA Form 9089 states that the position requires three months of experience in the proffered position. There is no educational requirement for the proffered position.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.<sup>1</sup>

The evidence in the record shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2003 and to currently employ 26 workers. According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar year. On the Form ETA 750B, signed by the beneficiary on December 8, 2007, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. Here, the petitioner has not established that it employed and paid the beneficiary the full proffered wage or any portion of the wage during the relevant period of analysis.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill.

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is not sufficient. Showing that the petitioner paid wages in excess of the proffered wage is also not sufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 116. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on October 3, 2008 with the receipt of the petitioner's submissions in response to the request for evidence (RFE.) As of that date, the petitioner's 2008 federal income tax return was not yet due. The petitioner's income tax return for 2007 is the most recent return in the A-file.<sup>2</sup> The petitioner's tax returns demonstrate its net income for 2007, as shown in the table below.

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<sup>2</sup> The petitioner's 2006 Form 1120S is also in the record. The information on this form covers the year before the priority date year. Thus, that form will not be analyzed in this section. It will be considered later in this analysis when reviewing the totality of the petitioner's financial circumstances.

- The 2007 Form 1120S states net income (loss)<sup>3</sup> of -\$261,969.

Thus, in 2007, the petitioner did not have sufficient net income to pay the proffered wage out of its net income.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns reflect its end-of-year net current assets for 2007, as:

- The 2007 Form 1120S states net current assets (liabilities) of -\$308,719.

In 2007, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onwards through an examination of wages paid to the beneficiary, or its net income or net current assets.

Throughout these proceedings, the petitioner and counsel have asserted that the beneficiary will be replacing sub-contractors, but have failed to document this. Going on record without adequate supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Unsupported assertions are not evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17

<sup>3</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2007) of Schedule K. *See* Instructions for Form 1120S, 2009, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed August 29, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). This petitioner did not have additional income and other adjustments shown on its Schedule K in 2007. Thus, for 2007, its net income is found on page 1, line 21 of the tax return.

<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

I&N Dec. 503, 506 (BIA 1980). That is, the petitioner did not document for the record the names of the individuals who worked as its sub-contractors. Also, the petitioner did not document their full-time employment or that they carried out the duties of the proffered position. The record does not document specific wages paid to the sub-contractors through Forms 1099-MISC, Miscellaneous Income, or similar independent evidence of amounts paid to individual workers. Counsel suggested that the line item representing the petitioner's "other costs" on the Form 1120S, Schedule A, which is delineated on the petitioner's Statement 4 as being, in part, sub-contract costs of \$57,483 is sufficient to document that sub-contractors were paid \$57,483 in 2007 to carry out the duties of the proffered job. This is not correct. For example, Statement 4 does not include documentation to establish the type of sub-contract work for which the petitioner paid \$57,483 in 2007. There is no indication at all on the tax returns or in other documentation in the record for what type work these sub-contract fees were paid. In addition, there is no documentary evidence in the A-file that the petitioner has replaced any sub-contractors or will replace any sub-contractors with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Again, there is no evidence that the work done by the petitioner's sub-contractors involves the same duties as the proffered position as set forth on the ETA Form 9089. The petitioner has not documented the position, duty, and termination of the sub-contractors who purportedly performed the duties of the proffered position. If those workers performed other kinds of work, then the beneficiary could not have replaced them.

Counsel indicated that the petitioner's personnel records document that the petitioner paid its sub-contractors substantial wages, during the course of its business, and that this demonstrated the petitioner's continuing ability to pay the wage. There are no personnel records in the A-file; there is no documentation in the record to identify any of the petitioner's sub-contractors and the wages paid to them, such as personnel/payroll records, Forms 1099-MISC, etc. Going on record without adequate supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Unsupported assertions are not evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, where the petitioner documents that it paid total wages in excess of the proffered wage during the relevant period, this is not sufficient to demonstrate the ability to pay the instant wage from the priority date onwards.

Counsel also suggested that language in the May 4, 2004 USCIS Interoffice Memorandum written by [REDACTED] supports the finding that information on the petitioner's various bank statements in the record are sufficient to demonstrate that the petitioner had the continuing ability to pay the proffered wage from the priority date onwards. *See* Interoffice Memo. from [REDACTED], Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, (May 4, 2004). First, USCIS memoranda merely articulate internal guidelines for USCIS personnel. They do not establish judicially enforceable rights. An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)). Second, bank account statements are not among the three types of evidence, enumerated at 8 C.F.R.

§ 204.5(g)(2) required to illustrate a petitioner's ability to pay a proffered wage. This regulation allows additional evidentiary material "in appropriate cases." However, here the petitioner has not shown why the documentation specified at 8 C.F.R. § 204.5(g)(2), such as a tax return, annual report or audited financial statement, is not applicable or otherwise paints an inaccurate financial picture of the petitioner. Second, the bank statements in the record show the amount in the petitioner's accounts on a given date, rather than the sustainable ability to pay a proffered wage from the priority date onwards. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank account statements somehow denote additional available funds that were not reflected on its tax returns, such as the petitioner's net income or the cash specified on Schedule L which was duly considered when reviewing the petitioner's net current assets.

Counsel submitted on appeal what appears to be a 2008 monthly sales chart for an unnamed company. The AAO finds that this document is not relevant to the petitioner's ability to pay the wage, and is not probative in this matter.

USCIS may also consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage, as noted by counsel. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Here, the petitioner stated that it incorporated in 2003 and has 26 employees. The petitioner has not established its historical growth since incorporating. The record does reflect that the petitioner's gross receipts increased from 2006 to 2007. However, this increase is not sufficient to overcome the evidence on the 2007 tax return which indicates that the petitioner has not had the funds available to pay the wage from the priority date onwards. Also, the petitioner has not established the occurrence of any uncharacteristic business expenditures or losses. It has not documented its claim that the beneficiary will be replacing its sub-contractors. Thus, assessing the totality of the circumstances in

this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage from the priority date onwards. The appeal must be dismissed on this basis.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.